IN THE SUPREME COURT
STATE OF WASHINGTON

CAUSE NO.: 81473-2

CITY OF BELLEVUE

Petitioner

v.

SHIN H. LEE, ET. AL.

Respondents.

On Appeal from the
King County Superior Court
The Honorable Michael J. Fox, Judge.

ANSWER TO BRIEF OF AMICUS CURIAE

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I. STATEMENT OF THE CASE

A. The Amicus Curiae Misstates the Statutory Framework of RCW 46.20.245

1. Not all Infractions are Issued in the Same Way.

a. No One is Arrested

Amicus Curiae misstate how "civil infractions" are issued. No one is arrested as they claim under RCW 46.64.015. *Brief of Amicus Curiae (BAC),* pg. 2. Once the violator receives a ticket he has 15 days to respond. *See* RCW 46.63.070. No arrest or incarceration is permitted. *See* RCW 46.61.021.

b. No Finding of Willful Failure to Appear

Amicus Curiae also misstate what occurs with a traffic citation at court: "[A] court determined that the driver's failed to comply..." is not the standard. *BAC,* pg. 4. There must be a showing that the violator "willfully" failed to pay, appear or respond. With civil infractions, there may or may not be court hearings to decide culpability. Often, the court simply sends an unsigned document to the Department of Licensing (DOL). DOL admits that it does not know if a judge has issued an order before the agency takes action against an individual's license. *CP* at 113.

2. DOL Can be Notified by an Unsigned Court Clerk.

A finding of committed or of failure to pay, appear or respond may be made by a court clerk or even the board of regents of a state university. *See* RCW 46.63.040. An infraction may even be "adjudicated" by a police "municipal violations bureau" under RCW 3.50.030.

3. Errors Cannot be Cured by the Lower Court Hearing.

Amicus Curiae argues that those defenses to suspensions of a driver's license pursuant to RCW 46.20.289 can be raised at the "court with jurisdiction over the underlying matter." *BAC*, pg. 6. This is the same argument that was rejected by this Court in *Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004).

> The City maintains that there was no due process violation because Moore and Wilson, like all drivers who have their licenses suspended under RCW 46.20.289, had an *opportunity to be heard at their respective court hearings* on the underlying violation. But as Moore and Wilson argued below, that court hearing does not address ministerial errors that might occur when DOL processes information obtained from the courts pertaining to license suspensions and revocations, e.g., misidentification, payments credited to the wrong account, the failure of the court to provide updated information when fines are paid.

Moore at 674, 91 P.3d at __. Regardless of what occurs in the courthouse, it is the DOL that issues Order of Suspension. RCW 46.20.245's constitutionality applies solely to whether the mandatory administrative procedures satisfy due process. As the statute states:

> An administrative review under this subsection shall consist solely of an internal review of documents and records submitted or available to the Department.

RCW 46.20.245. No amount of internal review of the same records that the DOL has relied upon to initiate its action is likely to identify or to correct court error or identity abuse. This inability to address the identified risks of erroneous deprivation is exacerbated by the presumption in RCW 46.20.245(2)(c) that the underlying court records are correct.

The Amicus Curiae cites to *Burri v. Campbell,* 102 Ariz. 541, 543, 434 P.2d 627 (1968), which holds that depositions and affidavits along with oral arguments are sufficient for due process in a financial responsibility hearing *BAC,* pgs. 17-18. However, a later case from Arizona held an administrative hearing, specifically a financial responsibility hearing, "must be on reasonable notice and must include an opportunity for the licensee to confront and cross-examine witnesses against him." *Brown v. Superior Court*, 22 Ariz.App. 72, 73 523 P.2d 799 (1974).

The Amicus Curiae also relies on *State v. Jones,* 76 Or.App. 157, 708 P.2d 1168 (1985), which is distinguishable from the present case based on statute. Under Oregon Statute, a judge may order the suspension of driver's license in addition to any fine or imprisonment. ORS 484.415 (2)(b). Oregon statute allows for the suspension of driver's license after

the licensee has already appeared in court before a judge and has been convicted of a traffic offense. ORS 484.415(1). This case is distinguishable from Washington law. As was stated above, DOL admits that it does not know if a judge has issued an order before the agency takes action against an individual's license. *CP* at 113. Therefore, *State v. Jones* is not applicable to the present case.

B. Respondents Appeal is Not a Collateral Attack

1. Respondents Are Not Collaterally Attacking

This Court has held that "[a] challenge to the constitutional validity of a predicate conviction which serves as an essential element of a charge ...is not a 'collateral attack' on the prior conviction." *State v. Summers*, 120 Wn.2d 801,810, 846 P.2d 490 (1993). Amicus Curiae argues that the Respondents case constitutes a "collateral attack". *BAC*, pg. 9. A collateral attack, however, may be maintained when a final order or judgment is ***void***, not merely erroneous or voidable. *Bresolin v. Morris*, 86 Wash.2d 241, 543 P.2d 325 (1975); *Peyton v. Peyton*, 28 Wash. 278, 68 P. 757 (1902).

In *State v. Baker*, 49 Wn.App. 778, 745 P.2d 1335 (1987), Division Three of the Court of Appeals set forth the framework for notice in driving while suspended cases. *Baker* found that the underlying driver's license suspension was ***void*** and reversed the criminal conviction. The court held

that Mr. Baker was denied due process when the DOL failed to mail notice of the suspension to his last known address.

> In determining what is reasonable notice under the circumstances, we balance Mr. Baker's significant interest in his driver's license against the Department's interest in efficient administration...Thus, Mr. Baker was denied due process...[P]rocedural due process is required *before* a license suspension becomes effective.

Baker at 782-783, 745 P.2d at __ (citing to *Bell v. Burson*, 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586, 1591 (1971) (emphasis in original). The suspension in *Baker* was *void ab initio*. It never existed. Likewise, in the Respondents case, the DOL, pursuant to RCW 46.20.245, failed to provide procedural due process before the suspensions became effective. The suspensions, therefore, were similarly void. When a final judgment is void, a collateral attack is maintained.

2. *Bellevue v. Montgomery* and *Upward v. DOL* Are Inapposite.

Amicus Curiae argue "Respondent's may not challenge the constitutionality of the procedural protections allowed prior to final suspension of their license when they took no action to challenge the license *sic*". *BAC*, pg. 9. To support this contention Amicus Curiae relies on *City of Bellevue v. Montgomery*, 49 Wn.App. 479, 743 P.2d 1257 (1987) and *Upward v. Dep't of Licensing*, 38 Wn.App.747, 689 P.2d 415

(1984). *BAC*, pg. 9. Both cases predate this Court's analysis in *Moore*, *supra.* Both cases support the Respondents position.

Upward and Montgomery were both driver's found to be Habitual Traffic Offenders by the DOL. "A copy of the order, together with a request for hearing form, was forwarded to Upward by certified mail. The return mail stub indicates that Upward received the notice, but did not request a hearing...he did not appeal." *Upward* at 748, 689 P.2d __. Mr. Montgomery similarly was found to be a Habitual Traffic Offender by the DOL. He requested and was granted a "formal hearing" by the DOL, prior to the sustaining of the suspension of his privilege to drive. *Montgomery*, 49 Wn.App.479, 480, 743 P.2d at __.

Conversely, in these cases, the Respondent's were informed that they would only have access to an internal document review. The only issues to be considered at this "customer service document review" would be whether they were the named party and whether the court had notified the DOL of a failure to pay, appear or respond. Additionally, each Respondent was advised by the DOL in writing that they were not entitled to a "formal hearing" or interview. *CP* at 79-80.

Finally, it is an important distinction to remember that hearings under RCW 46.20.245 are specifically excluded from the APA's procedural protections. The DOL, in other APA exempt matters, has

adjudicative rules that meet minimum due process standards. *See* WAC 308-104-340.

Amicus Curiae rely on *Upward, supra,* to establish that a collateral attack is barred. "While there may be certain kinds of predicate offenses that could be collaterally challenged, there is no indication that this is one of those rare circumstances where it would be permissible." *BAC*, pg. 10. Amicus cites to *State v. Ponce*, 93 Wn.2d 533, 611 P.2d 407 (1980) (incorrectly cited as *State v. Ozuna* by Amicus) for this proposition.

Ponce, once again, was a Habitual Traffic Offender case where the petitioner was challenging, due to the denial of counsel, the predicate infraction convictions making him a habitual offender (at the time of the case infractions were criminal in categorization). *Ponce* at 539, 611 P.2d at __. This Court, in *Ponce*, held that when a defendant is denied of his constitutional rights, the underlying infraction conviction could not be used to support a habitual traffic offender conviction. *Ponce* at 540, 611 P.2d at __. "Such a conviction is void and subject to collateral attack." *Id* at 540.

The Respondents cases, just like those in *Ponce*, *supra*, are of equal constitutional concern. The Respondents were denied due process, a fundamental constitutional right. Their convictions are void and are subject to collateral attack.

4. Respondents Were Not Precluded From Challenging RCW 46.20.245

Amicus Curiae raised for the first time on appeal whether the DOL should have been a party to the action below. It states statutory procedures were not followed properly by the parties, citing to RCW 7.24.110. RCW 7.24.110 is irrelevant in the instant case. Washington's courts have long held that "all courts, including lower trial courts, have inherent power to review agency action to ensure that it is not arbitrary and capricious, or contrary to law." *State v. MacKenzie*, 114 Wn.App. 687, 695-696, 60 P.3d 607 (2002), *quoting State v. Ford*, 110 Wn.2d 827, 828-830, 755 P.2d 806 (1988). The *MacKenzie* court wrote:

> To the extent that a lower court interprets the language of an administrative rule in a criminal proceeding, or determines whether an agency's action in interpreting a rule is contrary to law, this is an exercise of its inherent powers under *Ford*, not an analysis of the rule making process itself.

MacKenzie at 696, 687 P.2d at __.

C. RCW 46.20.245's Procedural Safeguards are Constitutionally Inadequate

1. The King County Superior Court Properly Applied *Moore.*

Amicus Curiae also object to the King County Superior Court's written opinion finding RCW 46.20.245 facially unconstitutional. Amicus Curiae write that the King County Superior Court's conclusions are

erroneous and not supported by the law. *BAC*, pg, 12. It further writes that the lower court misapplies this Court's holding in *Moore*, *supra,* by reading the Superior Court's decision as requiring "the ability to put on live testimony or to compel witnesses or to cross examine them." *BAC*, pg, 13. Amicus Curiae further write that Moore only allows for the correction of "ministerial errors." *BAC*, pg. 13.

Amicus Curiae misread the King County Superior Court's decision. The Superior Court held that:

> This statute fails to provide for a meaningful due process administrative hearing; providing only for an "interview" in writing. There is no opportunity for cross examination or any other due process protections as a matter of right. The decision to conduct a hearing and what form that hearing will take rests solely with the Department of Licensing. No witnesses can be subpoenaed and no live testimony can be taken. The procedures, therefore, as set forth in RCW 46.20.245 fail to comply with both substantive and procedural due process and fail to address the due process concerns raised in *Redmond v. Moore* (citation omitted).

CP at 176. There is nothing in the King County Superior Court's decision requiring live testimony or the compelling of witnesses as Amicus Curiae suggests. *BAC*, Pg. 13.

The absence of the ability to procure live testimony was only one of the reasons why the lower court found RCW 46.20.245 unconstitutional on its face. The court specifically found that RCW 46.20.245 fails to provide for a meaningful administrative hearing because it only allows for

an "interview in writing;" and, that there are "no other due process protections as a matter or right". Under RCW 46.20.245, this includes but is not limited to knowing when the interview is going to take place, where the interview is going to take place, the ability to appear at the interview and the ability to present evidence at the interview. This does not mean, as Amicus Curiae points out, that "there must be a full evidentiary hearing." *BAC*, pg. 14. The decision of the King County Superior Court is supported by *Moore, supra.*

2. Referral Back to the Lower Court is an Inadequate Remedy

Amicus Curiae writes that the legislature, through RCW 46.20.245 "gave to drivers, with no legitimate basis to challenge their license suspensions due to such ministerial errors, ample time (45 days) to work with the courts to come into compliance so that their licenses would not be suspended." *BAC*, pg. 13-14. This ignores completely this Court's direction in *Moore, supra.* The *Moore* Court specifically discussed an erroneous suspension for almost eight months when DOL was misinformed by the court of a conviction. Another driver was erroneously suspended after being falsely identified by the court as having an unpaid ticket. That driver could not obtain a hearing from the court to correct the matter for over a month ***after*** his driver's license was suspended. *Moore* at 673, 91 P.3d at __. If RCW 46.20.245 was an attempt to remedy the

due process failures described by this Court's decision in *Moore*, as Amicus Curiae suggests, it fails to achieve this result.

3. Appeal Right is not a Substitute for Due Process

Amicus Curiae argues that, even if there is a due process violation in these "customer service document reviews", these due process violations can be cured because RCW 46.20.245 grants the driver the right to an appeal. "Importantly, the driver may also obtain judicial review of the department's decision issued after its administrative review." *BAC*, pg. 14. This right of appeal, however, is not a substitute for due process. This appeal is limited to the same issues as the "customer service document review" and it provides no additional due process protections. The driver that had no opportunity to present evidence in the administrative hearing is bound by the record made at the administrative level.

RCW 46.20.245(2)(e) is a post suspension remedy. It is "available in the same manner as provided in RCW 46.20.308(9)," and is strictly based on the record made at the "customer service document review." Additionally, RCW 46.20.308(9) describes what the judicial appeal process entails. It states, in relevant part:

> Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, *the appeal shall be limited to a review of the record of the administrative hearing*...The superior court shall accept those factual determinations supported by substantial

> evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department.

RCW 46.20.308(9) (emphasis added).

A judicial appeal for an unpaid infraction suspension is limited to the record from the "customer service document review;" it is *not* a *de novo* appeal. The superior court must accept the factual determinations supported by substantial evidence; namely, the very same prima facie evidence as the "customer service document review" of whether the appellant is the correctly named party, and, whether the court record accurately *reflects* what was done. This is true even if what was done *occurred in error*.

Consequently, an appeal on this meaningless record provides the driver with no additional due process safeguards at the appellate level. Offering a license holder the "right" to an appeal does not afford any greater due process protections, when that appeal is limited to the meaningless "customer service document review" below. Moreover, should a license holder appeal, RCW 46.20.245 provides for no automatic stay of the license suspension.

4. *Mathews* Second Prong Analysis

Amicus Curiae acknowledge that the focus before the Court is the second prong of the *Mathews* test. *BAC*, pg. 15. *See Mathews v. Eldridge*,

424 U.S. 319,333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). By not discussing at all *Mathews* prongs one and three, Amicus Curiae tacitly acknowledge that those elements of the *Mathews* test have been met by Respondents.

The second *Mathews* factor is the risk of erroneous deprivation of the property right at stake. In *Mathews*, the United States Supreme Court clearly noted that "...the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'". *Mathews v. Eldridge*, 424 U.S. 319,333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).

This Court discussed the second Mathews factor at length in *Moore, supra*. In its analysis, this Court cited with approval to the United States Circuit Court's decision in *Warner v. Trombetta*, 348 F. Supp. 1068, (M.D. Pa. 1972), *aff'd*, 410 U.S. 919, 93 S.Ct. 1392, 35 L.Ed.2d 583 (1973), requiring a due process hearing. *Trombetta* notes that:

> [e]ven if the underlying conviction itself cannot be contested, there still remained the possibility of error, including misidentification of the infractor, miscalculation of the fine by the court, and errors on the report of conviction form."

Moore at 672, 91 P.3d at __ (quoting *Trombetta,* 348 F. Supp. at 1071).

In *Moore, supra*, this Court quoted directly from the conclusion in *Trombetta*:

> The fatal defect in the statute at bar is that there is no provision made for any type of *administrative hearing* with notice and an opportunity to be heard before the revocation action becomes effective. Hence, the possibility exists that error in a conviction record could result in the revocation of the license of an innocent motorist. Under these circumstances, we conclude that the essentials of due process require the opportunity for some sort of meaningful *administrative hearing* prior to the revocation of an operator's license.

Moore at 672, 91 P.3[d] at __ (quoting *Trombetta,* 348 F. Supp. at 1071) (emphasis in original). Unfortunately for the Respondents and every other similarly situated license holder, RCW 46.20.245 does not provide that meaningful administrative hearing.

5. *Lytle v. DOL* Defines a Hearing.

In *Lytle v. Department of Licensing* 94 Wn.App 357, 971 P.2d 969(1999). Division Three was called upon to define the minimum characteristics of a Due Process hearing in the context of a driver's license suspension pursuant to RCW 46.20.308. Unlike the present case, the license suspension pursuant to RCW 46.20.308 is intended to protect public safety. The suspensions pursuant to RCW 46.20.308 are often as short as 90 days. The court in *Lytle*, wrote;

> Due process requires notice and a meaningful opportunity to be heard. *Whitney*, 78 Wn. App. at 510. The word "hearing" certainly implies that some type of oral presentation, or the introduction of some type of evidence, will be directed to one's auditory senses. *Flory*, 84 Wn.2d

> at 571. Yet, the 1995 amendments to RCW 46.20.308(8) now allow the sworn report and the complete police report to constitute prima facie evidence that the implied consent statute was complied with by the officer(s). The DOL's burden is then met. The burden then shifted to Mr. Lytle to refute the prima facie evidence...Under these facts, Mr. Lytle had to refute that prima facie evidence without the arresting officers' presence. He was unable to cross-examine the evidence used against him.

Lytle, Supra, at ___ (1999). While the factual predicates for a suspension under RCW 46.20.308 may be more complex than the issues to be determined under RCW 46.20.245, both statues provide the Department with the ability to presume the truth of the documents before them. It was in part the presumptive nature of RCW 46.20.308 that motivated the *Lytle* Court's insistence that due process hearings include the right to cross examination.

In the present cases the DOL is presuming the accuracy of the unsigned, clerical paper work that it receives. RCW 46.20.245. Under RCW 46.20.245, there is no right to challenge the clerical paperwork let alone to cross examine or to issue subpoena or subpoena duces tecum regarding the underlying infraction or the court papers that resulted in the finding. As noted above, the documentation that the DOL relies upon to support the suspensions under RCW 46.20.245 are clerical entries which may have never been reviewed, approved or seen by a Judge or Magistrate. *CP* at 113.

Similarly, Division One of the Court of Appeals, has also struggled to define the minimum requirements of a Due Process hearing. *See Mansour v. King County*, 131 Wn.App. 255, 128 P.3d 1241 (2006). There the County attempted to have a dog removed and the owner was provided a full hearing. The court ruled that the County's failure to apply a preponderance of the evidence standard and its failure to afford the owner the power of subpoena constituted a violation of procedural due process. The court held that Mr. Mansour was entitled to effectively present his case and to rebut the evidence against him; and, that "[d]ue process requires that he be able to subpoena witnesses and records." *Mansour* at 259, 128 P.3^{d} at __.

An adequate standard of proof is also a mandatory safeguard. The standard of proof instructs the fact finder "concerning the degree of confidence our society thinks he should have in the correctness of the factual conclusions for a particular type of adjudication." *Id.* at 264, 128 P.3d at ___. The nature and importance of the interest subject to erroneous deprivation establishes the minimum standard of proof required to satisfy due process. "That standard allocates the risk of error between the litigants: it is indicative of the relative importance attached to the ultimate decision. Thus, the more important the decision, the higher the burden of proof." *Id.* at 265, 128 P.3rd at __.

In addition that court said:

> The Board rules require that an appellant have the right to have counsel, offer witnesses and evidence in his behalf, examine and cross-examine witnesses, impeach any witness, rebut evidence against him, and choose to present his case before or after the respondent's presentation. These are fine as far as they go. But the Board attorney's refusal to permit discovery or subpoenas significantly limited Mansour's ability to offer witnesses and evidence on his behalf.

Mansour at 269, 128 P.3d at __.

In these cases, the same concerns should be present. From the Department's Amicus Curiae brief it is apparent that this Court must reiterate and clarify that a hearing is more than a "customer service document review." Amicus Curiae state that "[t]he word 'hearing' itself has no particular meaning when applying the *Mathews* factors." *BAC*, pg. 16. This Court should reaffirm that the word ***"hearing"*** does have meaning prior to the deprivation of a driver's license and that, at a minimum, the requirements of *Lytle* and *Mansour*, *supra* must be met.

6. The DOL Does Not Wish to Seek the Truth.

Amicus Curiae further argues that "[n]either the superior court nor the Respondents have explained how the risk of error, if any, inherent in the truth finding process provided by RCW 46.20.245 can be reduced by allowing live testimony, compulsion of witnesses, or cross-examination of

them." *BAC*, pg, 16. The problem is that RCW 46.20.245 is not designed to be a "truth finding process."

In fact, the DOL admitted at the trial court level that they were not able to accommodate even the most basic due process requirements, let alone address the issues of judicial or ministerial errors raised by *Mathews* and *Moore, supra*, that would lead to a genuine "truth finding process". DOL's own Management Analyst Carla Weaver-Groseclose explained it best to the trial court:

> Q: Okay. Now, if the person requests the review, are they notified as to when this review is going to take place by mail?
>
> A: No, they're not. The Department of Licensing just – gets review documentation in. We do the review, and then we send the driver a letter of what the outcome of the review was.
>
> Q: So what if the person wants to subpoena witnesses or testify at this review? Can they do that?
>
> A: No, they cannot. We don't have that kind of option set up.

CP at 126-127. (Testimony of DOL Management Analyst Carla Weaver-Groseclose).

RCW 46.20.245 has no provisions for a driver facing a suspension action to even know when their "customer service document review" is taking place, much less to testify at it. Drivers are also not allowed to

subpoena witnesses or to present evidence. They are merely told the result of the hearing by letter. *CP* at 126-127. This is hardly a "truth finding process" as described by Amicus Curiae. *BAC,* pg. 16.

II. CONCLUSION

Amicus Curiae has presented no new reasons why RCW 46.20.245 is not unconstitutional on its face. Respondent asks this Court affirm the lower court's ruling finding RCW 46.20.245 unconstitutional on its face.

Respectfully submitted this 6th day of November, 2008

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